

Summary Table of Contents

Chapter 1	The Payment Systems Landscape
Chapter 2	Collection of Paper Checks — The Legal Framework
Chapter 3	Check Truncation and Automated Collection Under the UCC
Chapter 4	Electronic Check Presentment, the ECCHO Rules, and the Role of Private Agreements
Chapter 5	Remotely Created Checks
Chapter 6	Conversion of Checks to ACH Debit Entries
Chapter 7	ACH Payments — The Legal Framework
Chapter 8	Check 21, Substitute Checks, and Image Exchange
Chapter 9	Impact of Check 21 on Bank Risks: Check Fraud, Overdrafts, and Stop Payment Orders
Chapter 10	Remote Deposit Capture
Chapter 11	Twenty-four Suggestions for Revamping Deposit Agreements
Chapter 12	Payments Convergence: Electronic Collection of Truncated Checks Using ACH Settlement Within a Framework of “Check Law”
Appendixes	
Appendix 1	Check Clearing for the 21st Century Act
Appendix 2	Final Check 21 Rule: Federal Register Explanation, Text of Regulation CC, and Official Commentary
Appendix 3	FRB Remotely Created Check Rule Amending Regulation CC

Appendix 4 Image and Document Flow

Appendix 5 Selected Excerpts from FRB Operating Circular No. 3 — Collection of Cash
Items and Returned Checks

Appendix 6 Regulation J — Subpart A

Contents

Dedication	iii
About the Authors	v
Preface	vii
Summary Table of Contents	xi

Chapter 1 The Payment Systems Landscape

Some Key Terms Used in the Payments Industry	1 — 1
Check Conversion	1 — 1
Check Image	1 — 2
Check Truncation	1 — 2
Electronic Check/E-Check/eCheck	1 — 2
Electronic Check Conversion (ECK)	1 — 3
Electronic Check Presentment	1 — 3
Image Replacement Document	1 — 4
Magnetic Ink Character Recognition	1 — 4
How Does Check Truncation Fit into the Overall Array of Payment Systems?	1 — 4
Checks	1 — 5
Path 1: Collection as a Paper Check	1 — 5
Path 2: Truncation of Paper Check	1 — 6
Path 3: Original Paper Check Truncated, Then Reconverted to Substitute Check	1 — 6
Path 4: Check Born as Remotely Created Check	1 — 7
Path 5: Conversion of Paper Check to ACH Debit Entry	1 — 8
Debit Cards	1 — 10
Credit Cards	1 — 11
Wire Transfers	1 — 12
Cash Transactions	1 — 14
Remittance Instruments	1 — 15
Stored-Value Cards	1 — 16
Comparison of Payment Systems: A Summary	1 — 16
Federal Reserve Study: Checks Continue to Fall While Electronic Payments Continue to Rise	1 — 17
The Impact of Check Conversion	1 — 18
Sharp Growth in Various Types of E-Payments	1 — 18
Summary of FRB Study Findings	1 — 19

Federal Reserve Symposium on “Rethinking Payments Law”	1 — 20
Different Legal Platforms for Different Payment Systems	1 — 20
A Constant Drumbeat — Check Conversion	1 — 21
The Duplication Problem	1 — 22
The Finality Principle.....	1 — 23
Is Check Law Outmoded? Is It Unfair?	1 — 23
The Convergence Principle	1 — 24
Exhibit 1.1: Key Features of Alternative Payment Systems	1 — 25

Chapter 2

Collection of Paper Checks: The Legal Framework

The Check as a Negotiable Instrument.....	2 — 1
A Typical Check Collection Scenario	2 — 2
The Check Collection Process: Three Key Issues	2 — 4
Drawer and Drawee Bank	2 — 4
Rights and Duties of Collecting Banks	2 — 6
Final Payment and Return Deadlines	2 — 8
Five Types of Check Fraud	2 — 12
Kiting	2 — 12
Forged and Counterfeit Checks.....	2 — 13
Altered Checks	2 — 14
Forged Indorsements	2 — 15
MICR Fraud	2 — 16
Counterfeit Check or Altered Check — With Modern Technology, It’s Not Always Clear	2 — 17
The Fourth Circuit Case	2 — 17
Payor Bank Has Burden of Proving an Alteration	2 — 18
Conflict Between the Fourth and Seventh Circuits	2 — 19
Evidentiary Problems Persist	2 — 20

Chapter 3

Check Truncation and Automated Collection Under the UCC

Four Levels of Truncation.....	3 — 1
Importance of the MICR Line	3 — 2
The 1990 UCC Revisions.....	3 — 3

Electronic Presentment.....	3 — 3
Electronic Notice of Return.....	3 — 5
Freedom of Contract	3 — 6
Check Signature Verification.....	3 — 7
Duties of Depository and Paying Banks.....	3 — 9
Encoding Warranties.....	3 — 10
Facilitation of Lockbox Operations.....	3 — 11
Postdated and Legended Checks.....	3 — 11
Check Retention.....	3 — 12
Converting Checks to Electronic ACH Debits.....	3 — 13
Is a Digital Image of a Check an “Item” Under the UCC?.....	3 — 14
Where Is the Legal Framework for Check Image Exchange?.....	3 — 15
Regulation J Amendments Do Not Solve the Problem.....	3 — 15
Does Article 4 of the UCC Fill the Gap?	3 — 16
Public Policy Concerns	3 — 17
Drafting Tip.....	3 — 17
Gaps in the UCC Regarding Check Image Exchange.....	3 — 17

Chapter 4

Electronic Check Presentment, the ECCHO Rules, and the Role of Private Agreements

The Key Concept of “Presentment”	4 — 2
The ECP Notice.....	4 — 4
Requirement of Timely Delivery of the Paper Check.....	4 — 5
Preliminary and Final Notices of Nonpayment.....	4 — 5
How ECP Notice and RNOTEs Reduce Return Item Risk: A Typical Scenario	4 — 7
Application of the ECCHO Rules to Image Exchange.....	4 — 9
Exhibit 4.1: The Bright Future of Checks: A Conversation with David Walker of ECCHO	4 — 13

Chapter 5

Remotely Created Checks

Background of the New Federal Rule	5 — 2
Old Law: Paying Bank Cannot Shift Loss Upstream.....	5 — 2
Efforts to Correct the Problem at the State Level.....	5 — 3
The FTC Telemarketer Rule.....	5 — 5

How the FRB Rule Works.....	5 — 5
The New Presentment and Transfer Warranty	5 — 5
Enforcement of Warranty Claims	5 — 7
Defenses to Warranty Claims.....	5 — 9
Scope of the Rule: What Is a Remotely Created Check?	5 — 10
How Was the Item Created?.....	5 — 10
The Broad Definition of “Account”	5 — 12
The Preemptive Effect of the New Rule.....	5 — 13
Drafting Tips for Deposit Agreements	5 — 14
Drafting Tip 1: Expand the Bank’s Right of Charge-Back	5 — 14
Drafting Tip 2: Delete “Per Se Authorization” Language?.....	5 — 15
Some Frequently Asked Questions About the New Rule.....	5 — 16
Did the FRB Consider Outlawing Remotely Created Checks?.....	5 — 16
Why Aren’t Remotely Created Checks Governed by Regulation E and the NACHA Rules?.....	5 — 16
Can a Payor Bank Recover Attorney Fees from a Depository Bank That Wrongfully Resists a Warranty Claim?	5 — 17
Is There Any New MICR-Line Identifier for Remotely Created Checks?	5 — 17
Why Not Repeal the Finality Rule of the UCC for All Checks?.....	5 — 18
Remotely Created Checks and the UCC Rules Governing Provisional Credit and Charge-Back: The Pennsylvania Decision	5 — 19
The Pennsylvania Case	5 — 19
Court Creates Ten-Day Presumption of Final Payment.....	5 — 20
Deposit Agreement Expanding Right of Charge-Back Cannot Affect Finality of Payment	5 — 21
Some Thoughts About the Pennsylvania Decision	5 — 22
OCC Sanctions and Guidelines on Remotely Created Checks.....	5 — 22
The Remotely Created Draft Scenario	5 — 23
The Wachovia Sanctions	5 — 23
Updated OCC Guidance.....	5 — 25
Exhibit 5.1: Agreement Between Wachovia and the OCC	5 — 26
Exhibit 5.2: Consent Order	5 — 48
Exhibit 5.3: OCC Bulletin 2008-12	5 — 57

Chapter 6

Conversion of Checks to ACH Debit Entries

An Examination of Three Types of Check Conversion	6 — 1
The RCK (Re-presented Check) Entry.....	6 — 2
The POP (Point of Purchase) Entry.....	6 — 3
The Back Office Conversion (BOC) Entry	6 — 4.1
The ARC (Account Receivable) Entry.....	6 — 4.2

Electronic Check Conversion Under Regulation E	6 — 5
Merchants and Other Payees Covered by Regulation E for the First Time	6 — 6
Consumer Authorization by Notice.....	6 — 6
Additional Notice About ECK Transactions.....	6 — 8
Collection of Service Fees via EFT.....	6 — 8
Addition of Electronic Check Conversion Services.....	6 — 9
Check Law vs. ACH Law: What Difference Does It Make?	6 — 10
First Scenario: Unauthorized Debit.....	6 — 11
Second Scenario: Stop Payment Orders.....	6 — 12
Third Scenario: Insufficient Funds.....	6 — 13
Combining ACH and Substitute Checks	6 — 14
RCK Entries	6 — 14
Ineligible ARC Entries.....	6 — 14
The Need for Service Agreements	6 — 15
ACH Conversion of Business Checks	6 — 16
Why Have Business Checks Been Ineligible for ACH Conversion?.....	6 — 16
NACHA Approves Limited Business Check Conversion.....	6 — 17

Chapter 7

ACH Payments — The Legal Framework

An Overview of ACH Networks	7 — 1
Parties to the Transaction	7 — 2
Typical Agreements	7 — 3
The Originator-Receiver Agreement.....	7 — 3
The Originator-ODFI Agreement.....	7 — 5
The Agreements Among the ODFI, the ACH Operator(s), and the RDFI.....	7 — 6
The RDFI-Receiver Agreement	7 — 8
Types of Transactions	7 — 9
Credit vs. Debit Transactions	7 — 9
Corporate vs. Consumer Transactions	7 — 9
Specific Payment Types.....	7 — 10
Risks Relating to Certain Payment Types.....	7 — 12
ACH Data Security Requirements	7 — 16
Legal Framework and Regulation E.....	7 — 18.1
Definitions and Scope	7 — 18.2
Disclosure Requirements — Initial Disclosures	7 — 19
Timing Requirements.....	7 — 19
Form of Disclosures	7 — 20
Online or Electronic Disclosures	7 — 21
Content of Disclosures.....	7 — 22
Disclosure Requirements — Periodic Statements.....	7 — 30

Disclosure Requirements — Periodic Error Resolution Notices	7 — 33
Disclosure Requirements — Change-in-Terms Notices	7 — 35
Preauthorized Transfers.....	7 — 36
Authorization Requirements	7 — 36
Stopping Payment	7 — 37
Notice of Varying Amount	7 — 37
Notice of Receipt	7 — 38
Consumer Liability for Unauthorized Transfers	7 — 38
Error-Resolution Procedures.....	7 — 39
System Malfunction and Financial Institution Error.....	7 — 44
Civil and Criminal Liability	7 — 45
Civil Liability.....	7 — 45
Criminal Liability.....	7 — 46
Freedom of Choice.....	7 — 46
More Protective State Law	7 — 46
Late Returns Under the NACHA Rules	7 — 47
Electronic Collection of ACH Returns.....	7 — 48
The Final Rule in a Nutshell	7 — 48
Authorization Requirements	7 — 49
Disclosure of Return Item Fees.....	7 — 50
Forms of Notice	7 — 50
Allocation of Fraud Losses Under the NACHA Rules	7 — 51
The NACHA Return Rules and Warranty Liability	7 — 52
FRB Amends Regulation E to Eliminate Receipts for ATM and Debit Card	
Transactions of \$15 or Less.....	7 — 52
Regulation E in a Nutshell	7 — 53
Background of the Rule	7 — 53
The Arguments Pro and Con.....	7 — 54
Final Rule Creates Exception for Both Debit Cards and ATM Transactions	7 — 55
Bottom Line	7 — 56

Chapter 8

Check 21, Substitute Checks, and Image Exchange

Short-Term and Long-Term Purposes of Check 21	8 — 1
Overview of Check 21	8 — 5
Broad Scope	8 — 5
Substitute Checks and Legal Equivalence Principle	8 — 6
The Key Players — Truncating and Reconverting Banks	8 — 6
Substitute Check Warranties	8 — 7
Substitute Check Indemnities.....	8 — 7
Expedited Recrediting for Consumers	8 — 7

Consumer Awareness.....	8 — 8
Substitute Check Applications.....	8 — 8
Continuing Importance of Checks.....	8 — 10
Key Check 21 Terms and Their Significance.....	8 — 11
Account and Consumer Account.....	8 — 11
Check.....	8 — 12
Claimant Bank.....	8 — 13
Collecting Bank.....	8 — 13
Consumer.....	8 — 13
Customer.....	8 — 14
Indemnifying Bank.....	8 — 14
MICR Line.....	8 — 14
Original Check.....	8 — 15
Paper or Electronic Representation of a Substitute Check.....	8 — 15
Person.....	8 — 16
Reconverting Bank.....	8 — 16
Substitute Check.....	8 — 18
Does the Item Qualify as a Substitute Check?.....	8 — 19
Image Standards for Substitute Checks.....	8 — 20
Reason for Return; Indorsements on Substitute Checks; Identification Information.....	8 — 20
MICR-Line Requirement.....	8 — 22
Sufficient Copy and Copy.....	8 — 23
Transfer and Consideration.....	8 — 23
Truncate and Truncating Bank.....	8 — 24
Warranties and Indemnities.....	8 — 24
UCC and Regulation CC Warranties.....	8 — 25
The Legal Equivalence Warranty.....	8 — 26
The Duplicate Payment Warranty.....	8 — 29
Substitute Check Indemnity.....	8 — 30
Consumer Protection: Expedited Recredit and Awareness Notice.....	8 — 33
Why Are Expedited Recredit Rights Important?.....	8 — 33
Conditions for Making a Claim.....	8 — 34
The First Condition.....	8 — 35
The Second Condition.....	8 — 35
The Third Condition.....	8 — 36
The Fourth Condition.....	8 — 36
Procedures for Making Claims.....	8 — 38
Timing: The 40-Day Rule.....	8 — 38
The 40-Day Rule and the UCC.....	8 — 39
Content and Form of Claim.....	8 — 40
The Bank’s Three Options in Responding to a Claim.....	8 — 41
The Consumer Awareness Notice.....	8 — 44
Who Gets the Notice?.....	8 — 47
Timing of the Notice.....	8 — 48

Contents of the Notice	8 — 48
Use of the Consumer Awareness Notice on Substitute Check Returns	8 — 49
Recredit of Consumer Accounts: A Comparative Analysis	8 — 50
Paper Check/UCC	8 — 50
Truncated Check/UCC	8 — 51
ACH Conversion/Regulation E	8 — 52
Substitute Checks/Check 21	8 — 52
Credit Cards/Regulation Z	8 — 52
Evaluation	8 — 53
Expedited Recredit for Banks	8 — 53
Circumstances Giving Rise to a Claim	8 — 53
Procedures for Making Claims	8 — 54
Check Identification and Indorsement Standards	8 — 56
Identification of Reason for Returned Checks	8 — 56
Identification of Reconverting and Truncating Banks	8 — 56
Indorsement Standards	8 — 57
Indorsement by the Depository Bank	8 — 57
Indorsement by Subsequent Collecting or Returning Bank	8 — 59
Indorsement by Reconverting Bank	8 — 59
Two Indorsement Location Specifications	8 — 60
Liability of Reconverting Bank for Illegible Indorsements	8 — 61
Credit Unions and Check 21	8 — 62
Share Drafts and Truncation	8 — 62
Share Drafts and Funds Availability Under Regulation CC	8 — 63
Credit Union Use of Substitute Checks	8 — 64
Credit Union Treatment of Overdrafts	8 — 65
Check 21 Consumer Awareness Disclosures	8 — 66
Early Experience Under Check 21	8 — 67
Creation of Duplicates	8 — 69
Problems with Substitute Check Quality	8 — 71
Requests for Originals or Sufficient Copies	8 — 73
Indemnity Claims	8 — 74
Problems with Image Quality	8 — 75
Changing Industry Standards	8 — 76
Intellectual Property Litigation Involving Image Exchange Technology	8 — 76
Looking into the Future	8 — 77
Check 21 as “Stealth” Legislation	8 — 77
New Opportunities for the Industry	8 — 78
Some Predictions	8 — 79
Continued Convergence of Payment Systems	8 — 79
Continued Federalization of Payments Law	8 — 81
Consumer Concerns About Check 21	8 — 81
The Race Toward Earlier and Earlier Truncation	8 — 83
Forged and Counterfeit Checks	8 — 84
Two Tempests in a Teapot?	8 — 85

The Big Picture for the Future.....	8 — 86
FRB’S 2007 Report to Congress on Check 21	8 — 87
FRB Revises Operating Circular No. 3 to Disclaim Liability for Electronic Items Where Data Is Captured from the Internet	8 — 88
FRB Letter Describes the Revisions to Bankers Around the Country	8 — 89
Bottom Line	8 — 91

Chapter 9

Impact of Check 21 on Bank Risks: Check Fraud, Overdrafts, and Stop Payment Orders

Check Fraud Risks.....	9 — 1
Kiting	9 — 1
Forged and Counterfeit Checks.....	9 — 4
“Confusion” Fraud	9 — 7
Comparing the Risk of Check Fraud and ACH Fraud	9 — 7
Overdraft Risks.....	9 — 8
Usury	9 — 9
High-to-Low Check Posting.....	9 — 9
Joint Accounts	9 — 9
Truth in Lending	9 — 10
Deceptive Trade Practices	9 — 10
Equal Credit Opportunity Act	9 — 10
Truth in Savings	9 — 11
Electronic Fund Transfers	9 — 11
Secured Overdrafts?	9 — 12
Stop Payment Risks.....	9 — 12

Chapter 10

Remote Deposit Capture

The Explosive Growth of Remote Deposit Capture.....	10 — 1
Is Remote Deposit Capture Allowing Checks to Live Longer?	10 — 4
Key Legal Issues Surrounding Remote Deposit Capture	10 — 6
What Federal Laws Apply?.....	10 — 6
Does the UCC Apply?.....	10 — 7
Allocating Fraud Loss in a Remote Deposit Capture Environment	10 — 8
Duplication Consternation.....	10 — 11

Allocating the Risk When There Is No Substitute Check	10 — 12
Allocating the Risk When There Is a Substitute Check	10 — 13
Allocating the Risk When a Duplicate Payment Involves an ACH Conversion.....	10 — 14
FRB Amendments to Regulation J Expanding Check 21 Warranties	10 — 14
Images Covered to Facilitate Check Truncation	10 — 14
Under Check 21, the Buck Stops with the Reconverting Bank.....	10 — 15
Protection for Reserve Banks as Reconverters.....	10 — 16
The Four Key Elements of Amended Regulation J.....	10 — 16
FRB Amendments to Operating Circular No. 3	10 — 17
Remote Deposit Capture Agreements	10 — 18
Customer Application Form/Underwriting	10 — 18
UCC and Check 21 Warranties	10 — 19
Warranties of Image Quality	10 — 20
Protection Against Duplicates.....	10 — 20
Summary of Warranties by the Merchant/Customer.....	10 — 21
Regulation CC and Other Timing Issues.....	10 — 21
Scanner/Software Issues.....	10 — 22
Contingency Plan	10 — 23
Other Suggested Provisions	10 — 23
Remote Deposit Capture Under the New BSA Manual	10 — 23
Exhibit 10.1: FFIEC Bank Secrecy Act/Anti-Money Laundering Examination	
Manual — Remote Deposit Capture.....	10 — 25

Chapter 11

Twenty-four Suggestions for Revamping Deposit Agreements

Suggestion 1 — Consumer Awareness Notice.....	11 — 1
Suggestion 2 — Unwitting Reconverter.....	11 — 2
Suggestion 3 — Postdated/Time-Dated/Legended Checks.....	11 — 2
Suggestion 4 — Deadline for Making Recredit Claims	11 — 2
Suggestion 5 — Overdrafts in Joint Accounts	11 — 4
Suggestion 6 — No Sight-Review of Drawer Signatures	11 — 4
Suggestion 7 — Remotely Created Checks.....	11 — 5
Suggestion 8 — Protecting the Bank's Right of Charge-Back	11 — 6
Suggestion 9 — Check-Cashing Fees/Thumbprints.....	11 — 7
Suggestion 10 — High-to-Low Check Posting.....	11 — 8
Suggestion 11 — Consensual Security Interests	11 — 8
Suggestion 12 — Risks from Truncation and Reconversion	11 — 9
Suggestion 13 — Faulty Check Stock.....	11 — 10
Suggestion 14 — Check Fraud Detection and Deterrence/Identity Theft.....	11 — 10
Suggestion 15 — “State-of-the-Art” Fraud Detection	11 — 11
Suggestion 16 — Overdrafts	11 — 11

Suggestion 17 — Stop Payment Orders	11 — 12
Suggestion 18 — Electronic Check Conversion	11 — 13
Suggestion 19 — Wire Transfer Recredit Claims	11 — 14
Suggestion 20 — Setoff of Social Security Direct Deposits	11 — 15
Suggestion 21 — Attorney Fees	11 — 15
Suggestion 22 — Arbitration Clause	11 — 16
Suggestion 23 — Waiver of Consequential Damages	11 — 16
Suggestion 24 — Digital Image as UCC “Item”	11 — 16

Chapter 12
Payments Convergence: Electronic Collection of Truncated Checks
Using ACH Settlement Within a Framework of “Check Law”

The NACHA “Convergence” Pilot Program	12 — 1
The Check ACH Coalition Report	12 — 4
Another Example of Convergence: ACH Debit Entries Treated as UCC “Items” to Fill Legal Gaps	12 — 5
Exhibit 12.1: Check ACH Coalition: Final Summary Report	12 — 7

Appendixes

Appendix 1
Check Clearing for the 21st Century Act

Appendix 2
**Final Check 21 Rule: Federal Register Explanation, Text of Regulation
 CC, and Official Commentary**

Appendix 3
FRB Remotely Created Check Rule Amending Regulation CC

Appendix 4
Image and Document Flow

Appendix 5
Selected Excerpts from FRB Operating Circular No. 3 — Collection of
Cash Items and Returned Checks

Appendix 6
Regulation J — Subpart A